IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 420 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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RAHIM ALIA GHELO NOORMOHAMMED SUMRA - Appellant
Versus
THE STATE OF GUJARAT - Respondent

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Appearance :
MR PK SHUKLA for the Appellant.
MR LR POOJARI, Additional Public Prosecutor for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 08/09/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal is preferred by the appellant under Section 374 (2) of the Code of Criminal Procedure, 1973 against the decision rendered by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 191 of 1995, by which the appellant came to be convicted for the offence under Section 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") and imposed sentence of RI of 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default SI for 6 months.

2. The short facts giving rise to the present appeal are as under:-

Mr. Pravinsinh Nanbha Jethva, Police Sub-Inspector, PCB Rajkot, was informed on 22-07-1995 by Head Constable Mr. D.R. Pandit, Head Constable Mr. Hansrajbhai, Head Constable Abeysinh Jadeja as well as Police Constable Vijaysinh Zala and Police Constable Vinodrai Rathod that one auto-rickshaw, bearing registration No. GTX 2259 was to pass through Kishanpura Chowk, Race Course road, Rajkot with contraband articles. The rickshaw was occupied by the appellant and another accused - Parbat @ Ghusa Nagjibhai Bharwad. On receipt of the information, PSI Mr. Jethva called two *panch-witnesses* and informed that these two persons are selling narcotic drugs, and as they are in possession of the same, a raid is required to be carried out. Thereafter, the

complainant along with *panch-witnesses* proceeded to Kishanpura Chowk and reached Shalimar Ice-cream Stall at about 2.00 P.M. One person out of two was driving the auto-rickshaw and another person was sitting on the rear seat of the rickshaw. When the auto-rickshaw was stopped, the person sitting on the rear seat fled from the place, and the person, who was driving the auto-rickshaw, i.e. the appellant was caught red-handed on the spot. On further inquiry, he gave his name as Rahim @ Ghelo Noormohammed Sumra. On search being conducted of his person in presence of the *panch-witnesses*, he was found in possession of ten small packets containing brown coloured powder as well as cash amount of Rs. 450/- (Rupees Four Hundred And Fifty Only). When a further search was carried out of the auto-rickshaw, nine small packets containing brown sugar were found. The appellant was asked as to whether he was having any pass or permit to keep the contraband article, to which he replied in the negative. The brown sugar was weighed in presence of the *panch-witnesses* and it was found to the tune of 1000 milli-grams. The brown sugar, which was seized, was sealed in presence of the *panch-witensses*. The sample was also obtained from the brown sugar for the purpose of sending the same to Forensic Science Laboratory ("FSL", for short). The appellant was, thereafter, arrested. The charge-sheet in the matter came to be filed on 11-09-1995 and as the mater was exclusively triable by the Court of Sessions, the charge against the accused was framed *vide* Exh. 1 for the offences punishable under

Sections 21 and 29 of the Act. The appellant was read-over and explained the charge and he pleaded not guilty to the charge and, thereafter, the matter was set down for full-fledged trial before the Additional Sessions Judge, Rajkot.

3. During the course of trial, the prosecution has examined the following witnesses:-

(i) PW 1 Umeshbhai Laljibhai Doria at Exh. 8;
(ii) PW 2 Nashirbhai Jasabbhai at Exh. 9;
(iii) PW 3 Jayantibhai Bhanabhai at Exh. 10;
(iv) PW 4 Mukeshbhai Kanjibhai at Exh. 12;
(v) PW 5 Babulal Ramjibhai Madiya at Exh. 15;
(vi) PW 6 Madarsinh Halubha Zala at Exh. 18;
(vii) PW 7 Pravinsinh Nanbha Jethva at Exh. 20;
(viii) PW 8 Vijaysinh Mangalsinh Zala at Exh. 24;
(ix) PW 9 Abhesinh Balvantsinh Jadeja at Exh. 25; and,
(x) PW 10 Dwijendra Prasad Rajaram Pandit at Exh. 26.

The prosecution has placed reliance on the following documents in order to bring home guilt against the accused:

(i) Complaint given by PSI Mr. P. N. Jethva at Exh. 21;

(ii) *Panchnama* of the raid carried out by Mr. P. N. Jethva at Exh. 13;

(iii) *Panchnama* in respect of search of the house of another accused - Parbat @ Ghusa Nagjibhai Bharwad at Exh. 14;

(iv) Extract of the Station Diary at Exh. 16;

(v) Letter written by PSI Mr. Jethva, PCB to Police Inspector, Pranagar Rajkot in respect of further investigation after the seizure of *muddamal vide* Exh. 17;

(vi) Extract of the Station Diary wherein the recovery and the weight of the *muddamal* has been mentioned *vide* Exh. 19;

(viii) Letter written by PCB, Rajkot City to Regional Transport Office, Rajkot in respect of seizure of auto-rickshaw bearing No. GTX-2259 *vide* Exh. 27;

(ix) Letter addressed to Police Inspector, PCB Rajkot City from FSL along with the report at Exh. 30 and 31, respectively;

(x) Letter, whereby the Deputy Commissioner of Police, Rajkot was sent report under Section 57 of the Act *vide* Exh. 36;

(xi) Letter written to the Assistant Director, FSL, Gujarat State by the PSI, PCB, Rajkot

City *vide* Exh. 37 and the receipt given by FSL in respect thereof at Exh. 32, etc.

4. At the conclusion of trial, further statement of the accused was recorded under Section 313 of the Code of Criminal Procedure. In his further statement, the appellant pleaded that he was falsely implicated in the commission of offence.

5. On the basis of the oral deposition and the documentary e*vide*nce adduced by the prosecution, the learned Additional Sessions Judge held that the appellant was found in possession of brown sugar to the tune of 1000 mgs in violation of the provisions of the Act. It was further held by the learned Additional Sessions Judge that the appellant was in conscious or actual possession of the brown sugar within the meaning of the Act. As per the discussion of the learned Additional Sessions Judge, the prosecution has established that all the mandatory provisions of the Act were complied with, and as the inextricable involvement of the appellant in the commission of the offence was proved, the appellant was convicted for the offences under Section 21 read with Section 29 of the Act. The learned Judge has held that the *muddamal* was properly sealed and sent to the FSL for the purpose of analysis. As there was no tampering of the *muddamal* article, the learned Judge convicted the appellant under Section 21 read with Section 29 of the Act. Thus, on the overall deposition adduced by the prosecution and the

documentary e*vide*nce relied upon by the prosecution, the learned Additional Sessions Judge convicted the appellant under Section 21 read with Section 29 of the Act and imposed the sentence of RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default, SI for 6 months.

6. Mr. P. K. Shukla, learned Advocate representing the appellant, submitted that the learned Additional Sessions Judge has committed error in holding that all the mandatory provisions were complied with by the prosecution. The learned Advocate further submitted that the *muddamal* samples were not sealed as per the normal procedure laid down for sealing of the *muddamal* articles. Even the sealing which was affixed on the *muddamal* articles was defective and on bare perusal of the evidence adduced by the prosecution, it becomes clear that there was complete inconsistency in the sealing procedure followed by the Investigating Agency and, therefore, the benefit of doubt is required to be given to the appellant. The learned Advocate further submitted that the seized *muddamal* article was to the tune of 1000 mgs, but the said fact is not reflected in the FSL report produced at Exh. 31 and it would give rise to doubt about tampering of *muddamal* articles. On perusal of the document at Exh. 31, the net weight of the *muddamal* is mentioned as 910 mgs, while in the oral deposition and the other documentary e*vide*nce adduced by the prosecution, the same is mentioned as 1000 gms. This

lacuna, as per the submission of the learned Advocate, goes to the root of the matter which dislodges the prosecution case. The *panchnama* produced at Exh. 13 mentions about the sealing procedure. On perusal of the *panchnama*, it becomes clear that after placing the *muddamal* article in the plastic-bag, the same was not twined with thread, and, thereafter, the seal of the Police Commissioner, Rajkot City was affixed on the *muddamal* article. While on perusal of the deposition adduced by the prosecution, it emerges that the *muddamal* article was, after the seizure, placed in the plastic-bag and the same was twined with thread. This inconsistency, as per the submission of the learned Advocate, is glaring and, therefore, it would amount to tampering of the *muddamal* article. Considering the aforesaid lacuna, the learned Advocate submitted that the appellant requires to be given benefit of doubt and be acquitted forthwith. In support of the submissions canvassed at the Bar, the learned Advocate has placed reliance on the following judgments:

(i) **Navinkumar Alias Shambuprasad Alias Bapji Chimanlal Vyas, 2006 (1) GLH 409;**

(ii) **State of Haryana Vs. Vikram Singh, (2002) 2 SCC 676;**

(iii) **Babu Vs. State of Kerala, (1999) 8 SCC 499;**

(iv) **K. Mohanan Vs. State of Kerala, (2000) 10 SCC 222;**

(v) Unreported decision dated 17-08-2001 rendered by the Division Bench in **Criminal Appeal No. 323 of 1996** rendered by the Division Bench of this Court in **Jitendra @ Sanjaykumar Suryakant Desai Vs. State of Gujarat.**

(vi) Judgment dated 07-05-2002 rendered in **Criminal Appeal No. 287 of 1999** rendered by the Division Bench of this Court in **Ganpatram Punmaram Vishnoi Vs. State of Gujarat.**

Thus, the learned Advocate for the appellant submitted that on overall perusal of the oral deposition and the documentary e*vide*nce, the prosecution has not established the entire link connecting the accused with the commission of offence. The sealing procedure was defective and even the weight of *muddamal* and the quantity of *muddamal*, which was recovered and subsequently sent to FSL, indicates deficiency of 90 mgs and it would raise doubt about the tampering of the *muddamal* article and, therefore, the benefit of doubt is required to be given in favour of the appellant and the appellant be acquitted forthwith in the matter.

7. Mr. L. R. Poojari, learned Additional Public

Prosecutor for the State of Gujarat, submitted that the prosecution has submitted that the prosecution has observed the mandatory provisions contained in the Act and no breach or violation of the mandatory provisions was committed by the prosecution, the learned Judge has rightly convicted the appellant for the offences punishable under Section 21 read with Section 29 of the Act. The learned Additional Public Prosecutor further submitted that there was no lacuna in the seizure of the *muddamal* article or sealing of the *muddamal* article and the lacuna pointed out by the learned Advocate on behalf of the appellant, is of a minor nature which can be overlooked when a contraband article of brown sugar is seized from the possession of the accused as all other formalities and procedure were scrupulously followed by the prosecution. On perusal of the entire e*vide*nce on record of the case, the prosecution has established that the short-fall in seizure of *muddamal* article was of a minor nature and, therefore, no undue weightage can be given to the said short-fall on which heavy reliance is placed by the learned Advocate on behalf of the appellant. The learned Additional Public Prosecutor has further submitted that the learned Judge has taken into consideration the entire gamut of oral deposition and the documentary e*vide*nce in proper perspective and even the mandatory provisions were scrupulously followed by the prosecution and, therefore, the learned Judge has rightly convicted the appellant under Section 21 read with Section 29 of the Act and, therefore, the

appeal preferred by the appellant requires to be dismissed. In support of his submissions made at the Bar, the learned Additional Public Prosecutor has cited the following judgments:

(i) **Laleshwar Rajak Kalanand Dhobi Vs. State of Gujarat, (2002) 7 SCC 704;**

(ii) **Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala, (1994) 6 SCC 569;**

(iii) **Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas Vs. State of Gujarat, 2006 (1) GLH 409;**

(iv) **State of Haryana Vs. Vidhya Dhar, AIR 2002 SC 1208;** and

(v) **Guffran Mohammad Hasad Kasai Vs. State of Maharashtra, 1994 CRI.L.J. 2014.**

8. This Court has heard Mr. P. K. Shukla, learned Advocate for the appellant-accused and Mr. L. R. Poojari, learned Additional Public Prosecutor for the respondent-State at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire e*vide*nce on record with reference to broad and reasonable probabilities of the case. This Court has also carefully considered the judgments cited by the learned Advocates of both the sides and there is no dispute about the ratio or

proposition laid down in those judgments.

9. On overall perusal of the oral deposition adduced by the prosecution and the documentary e*vide*nce on which the reliance has been placed, it is clear that the prosecution has followed the mandatory provisions i.e. Sections 50, 57, 43, etc. However, in the seizure of *muddamal* from the possession of the appellant, the sealing procedure was, in our view, not followed in a scrupulous manner. There are many defects in the sealing procedure which, in our view, is glaring and cannot be overlooked by the Court as provisions of the NDPS Act are very stringent. The *panchnama* at Exh. 13 mentions about the sealing procedure wherein it has been stated that, after the seizure of the *muddamal* articles from the possession of the appellant, it was weighed in the presence of the *panch-witnesses* and it was weighed to the tune of 1000 mgs. Thereafter, it was kept in the plastic-bag and the plastic-bag was packed and subsequently, it was kept in the match-box and the signatures of the *panch-witnesses*, which were obtained, were placed on the match-box. Thereafter, it was packed in a plain paper. The signatures of the *panch-witnesses* were also found thereon and the seal of the Police Commissioner, Rajkot City, was affixed on the said seizure of the *muddamal*. On bare perusal of the procedure of the sealing adopted by the Investigating Agency, it becomes clear that in the panchanama, it is not mentioned that the plastic-bag which was kept in the match-box, was twined with thread and,

thereafter, it was sealed in the presence of *panch-witnesses*. While, on the other hand, if we look at the complaint given by PSI Mr. P. N. Jethva *vide* Exh. 21, the procedure, prescribed therein for sealing, mentions about the sealing of the *muddamal* article with twine of the thread while this aspect is not mentioned in the *panchnama*. Further, the deposition, adduced by PW 8 Vijaysinh Mangalsinh Zala *vide* Exh. 24, mentions about the sealing procedure with the help of sealing wax and the twined thread. The deposition given by PW 9 Abeysinh Balvantsinh Jadeja *vide* Exh. 25 also mentions about the sealing procedure wherein he mentions about the sealing with the help of twine of the thread of the *muddamal* article. Likewise, PW 10 Dwijendra Prasad Rajaram Pandit *vide* Exh. 26 has reiterated the same fact in his deposition. Thus, with regard to the sealing procedure, there is inconsistency in the *panchnama* as well as in the complaint and the deposition adduced by the prosecution witnesses. When there is inconsistency in the sealing procedure, it would, in our view, give rise to doubt and the benefit of the same requires to be given to the appellant. The *muddamal* article, which was weighed in the presence of *panch-witnesses*, showed a short-fall of 90 mgs, as, as per the FSL report produced at Exh. 31. As per the deposition adduced by the prosecution and the documentary e*vide*nce by the prosecution, such as the *panchnama* and the complaint produced at Exhs. 13 and 21, respectively, the *muddamal* article, which was seized, was to the tune of 1000 mgs, while on perusal

of the document at Exh. 31, which is the FSL report, it shows the short-fall of 90 mgs. This short-fall, in our view, would give rise to doubt about the tampering of *muddamal* article. Thus, when the sealing procedure itself is defective and there is a short-fall in the *muddamal* articles seized and the one which was sent to FSL, the same, in our view, can be said to be defective and the benefit of the same requires to be given to the appellant. The discrepancy in the *panchnama* with regard to the sealing procedure has not been explained by any of the prosecution witnesses. When the discrepancy, as shown in the *panchnama*, is viewed in the light of the defective procedure of the sealing, which was followed by the Investigating Agency at the time of the sealing of the *muddamal* articles, then the same, in our view, would give rise to doubt about the entire procedure followed by the Investigating Agency of sealing the *muddamal* articles.

10. The provisions contained in the Act are stringent and, therefore, it is incumbent upon the prosecution to follow the procedure of sealing of *muddamal* article in a very scrupulous manner. When there is an inherent defect in the sealing procedure and a short-fall in the *muddamal* article, then the appellant, in our view, is required to be acquitted on that ground alone. No doubt, as per the discussion hereinabove, the prosecution has followed other mandatory provisions as prescribed under Sections 43, 50 and 57 of the Act but, on the short ground of

defective sealing procedure and the short-fall in the weight of the *muddamal* article, the appeal preferred by the appeal is required to be allowed.

11. In the light of the foregoing discussion, the appeal is allowed. The judgment and order passed by the learned Additional Sessions Judge, Rajkot District in Criminal Appeal No. 191 of 1995, convicting the appellant and imposing RI for 10 years RI and fine of Rs. 1,00,000/- (Rupees One Lakh Only) under Section 21 read with Section 29 of the Act, is hereby quashed and set aside *qua* the appellant. The appellant be set at liberty forthwith if he is not required in any other matter. *Muddamal* articles be disposed of in terms of judgment and order given by the learned Additional Sessions Judge, Rajkot District.

[ANIL R. DAVE, J.]

[H. B. ANTANI, J.]

/shamnath